

**Pony Express Courier Corp. and Teamsters 327, affiliated with International Brotherhood of Teamsters, AFL-CIO. Case 26-CA-15554**

July 14, 1993

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

On May 4, 1993, the General Counsel of the National Labor Relations Board issued a complaint alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 26-RC-7512. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On May 28, 1993, the General Counsel filed a Motion for Summary Judgment. On June 3, 1993, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

**Ruling on Motion for Summary Judgment**

In its answer the Respondent admits its refusal to bargain, but attacks the validity of the certification on the ground that the employees in the certified unit are guards within the meaning of Section 9(b)(3) of the Act, and that, as the Union admits nonguards into membership, it cannot be certified as representative of the unit.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding.<sup>1</sup> The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

<sup>1</sup> We note in this regard that the Respondent failed to request review of the Regional Director's determination in his January 27, 1993 Decision and Direction of Election that the unit employees are not guards. In these circumstances, Respondent is precluded from raising the same issue in the instant proceeding. See Sec. 102.67(f) of the Board's Rules and Regulations. See also *A. S. Horner, Inc.*, 246 NLRB 393 (1979); and *Walnut Mountain Care Center*, 236 NLRB 284 (1978).

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The Respondent, a corporation with offices and places of business in Nashville and Cookeville, Tennessee, has been engaged in the interstate transportation of commodities.

During the 12-month period ending March 31, 1993, the Respondent, in conducting its business operations, derived gross revenues in excess of \$50,000 for the transportation of freight and commodities from the State of Tennessee directly to points outside the State of Tennessee.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

**A. The Certification**

Following an election conducted by mail between February 15 and 26, 1993, the Union was certified on March 8, 1993, as the collective-bargaining representative of the employees in the following appropriate unit:

All full time and regular part time courier guards employed by Respondent at its Nashville and Cookeville, Tennessee, facilities, including lead courier guards, relief courier guards and sorter courier guards; and excluding all office clerical employees, sales employees, dispatchers, professional employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

**B. Refusal to Bargain**

On March 6 and 18, 1993, by letter, the Union requested the Respondent to bargain, and, on April 13, 1993, the Respondent refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

**CONCLUSION OF LAW**

By refusing on and after March 8, 1993, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

## ORDER

The National Labor Relations Board orders that the Respondent, Pony Express Courier Corp., Nashville and Cookeville, Tennessee, its officers, agents, successors, and assigns, shall

## 1. Cease and desist from

(a) Refusing to bargain with Teamsters 327, affiliated with International Brotherhood of Teamsters, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full time and regular part time courier guards employed by Respondent at its Nashville and Cookeville, Tennessee, facilities, including lead courier guards, relief courier guards and sorter courier guards; and excluding all office clerical employees, sales employees, dispatchers, professional employees, guards and supervisors as defined in the Act.

(b) Post at its facilities in Nashville and Cookeville, Tennessee, copies of the attached notice marked "Ap-

pendix."<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Teamsters 327, affiliated with International Brotherhood of Teamsters, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full time and regular part time courier guards employed at our Nashville and Cookeville, Tennessee, facilities, including lead courier guards, relief courier guards and sorter courier guards; and excluding all office clerical employees, sales employees, dispatchers, professional employees, guards and supervisors as defined in the Act.

## PONY EXPRESS COURIER CORP.

<sup>2</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."